

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SANDRA KNOBLICH**  
Claimant

VS.

**NU WA INDUSTRIES, INC.**  
Respondent  
Self-Insured

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Docket No. 236,256

**ORDER**

Respondent appeals the July 24, 2001, Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded a 90 percent permanent partial general body disability based upon a 100 percent loss of wages and an 80 percent loss of task performing ability. Respondent contends claimant should be limited to her functional impairment as claimant was capable of earning wages comparable to those being earned with respondent for several months after leaving respondent's employ. The Appeals Board (Board) held oral argument on February 19, 2002.

**APPEARANCES**

Claimant appeared by her attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent appeared by its attorney, John I. O'Connor of Pittsburg, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, the parties stipulated that claimant was entitled to temporary total disability compensation beginning November 17, 1996, through January 30, 1998. The parties further agreed that based upon claimant's average weekly wage of \$229.37, she would be entitled to temporary total disability benefits at the rate of \$152.92 per week. Additionally, the parties stipulated the Award of the Administrative Law Judge contained a calculation error, which will be corrected at the time the Board computes its award in this matter.

**ISSUES**

What is the nature and extent of claimant's injuries?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant worked for respondent, trimming out the inside of campers. On August 8, 1995, while trimming out the storage area in a kitchen unit, claimant's knees scissored and her buttocks hit the floor. Claimant could not get up and was forced to ask for assistance. She experienced immediate problems in her right leg, right knee and right hip. Claimant was treated by respondent's first aid department and later went to Glenn V. Carney, D.O., her family doctor. After being treated by her family doctor for a period, claimant was referred to Kenneth A. Jansson, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Jansson performed an arthroscopic procedure on claimant's right knee which, in claimant's words, provided no relief. Claimant continued to feel pain in her calf, hip and buttocks, and eventually came under the care of Robert Drisko, M.D., who, after reviewing an MRI, concluded claimant required back surgery.

Claimant's initial back surgery consisted of an L5-S1 discectomy. After she was released from the hospital, claimant told Dr. Murati that one week after being home, she "heard and felt a pop" in her low back. She was returned to the emergency room, readmitted to the hospital and returned to the care of Dr. Drisko. A second MRI displayed a reherniation, and claimant underwent a second back surgery on January 2, 1997, which consisted of a repeat L5-S1 discectomy. Claimant reported good results to the doctor following the second surgery.

Claimant was released by Dr. Drisko on January 30, 1998. Claimant began working for Russell Stover Candies shortly after.

It should be noted the parties stipulated that claimant was on temporary total disability compensation until January 31, 1998. However, at her deposition, claimant testified she began working for Russell Stover in January 1998. The Board, therefore, will terminate claimant's temporary total disability compensation effective January 30, with claimant's start at Russell Stover to be calculated as January 31, 1998.

Claimant continued working for Russell Stover for approximately nine months until September 1998, when her duties were changed. The new duties required that claimant squat, bend and pick things up, which claimant stated was outside the restrictions of Dr. Drisko. Claimant was forced to terminate her job at that time. Claimant testified that she continued looking for employment until March 1999. However, a review of the record confirms claimant continued applying for jobs through July 1999.<sup>1</sup>

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<sup>1</sup> Knoblich Depo., Exhibit 1.

Claimant was referred by her attorney to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation and a member of the American Board of Electrodiagnostic Medicine and the American Board of Independent Medical Examiners. Dr. Murati saw claimant on May 17, 1999, at which time her chief complaints included her right knee, left knee and low back. Dr. Murati diagnosed claimant with failed back surgery syndrome, right knee pain status post patella chondroplasty and chondroplasty of the medial femoral condyle. He rated claimant at 23 percent to the body as a whole for her various injuries pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Dr. Murati released claimant to work with restrictions that she not climb ladders, squat, crawl, kneel, use repetitive foot controls with the right and must at all times use good body mechanics. Claimant could occasionally sit, stand and walk with less than occasional bending and climbing of stairs. Lifting from knuckle height and above was limited to 10 pounds occasional, 5 pounds frequent and zero pounds constant.

Dr. Murati was provided a copy of the vocational rehabilitation report of Jerry Hardin. After reviewing the report, Dr. Murati opined that claimant was incapable of performing 80 percent of the tasks listed in Mr. Hardin's task list. Dr. Murati's task loss opinion was a slight adjustment from that given by Mr. Hardin, as Dr. Murati felt claimant was incapable of performing certain tasks that Mr. Hardin had opined she was capable of performing.

Claimant was referred to Philip R. Mills, M.D., by the Administrative Law Judge for an independent medical examination. Dr. Mills examined claimant, finding she was at maximum medical improvement and opining she suffered an 11 percent permanent partial impairment to the body as a whole utilizing the AMA Guides, Fourth Edition. The rating was for a combination of her back and knee injuries. Dr. Mills also restricted claimant, advising she should avoid prolonged standing or walking, including 15 to 30 minutes maximum without rest. He advised claimant should avoid stair climbing and would be restricted to sedentary activities where she could change positions on an as-needed basis. Kneeling and squatting were prohibited.

Respondent referred claimant to Dan R. Zumwalt, vocational rehabilitation consultant, for the purpose of addressing claimant's ability to obtain employment. In reviewing Mr. Zumwalt's report, the Administrative Law Judge found that of fifty-three potential employers, Mr. Zumwalt was able to find five who had jobs available that may or may not meet claimant's restrictions. The Administrative Law Judge found that pursuant to Mr. Zumwalt's testimony, there were no job opportunities for claimant, as even the five jobs he found, violated the restrictions of Dr. Mills and Dr. Murati. It was unclear from Mr. Zumwalt's testimony whether he addressed potential accommodations with these employers, although he did state on separate occasions that he concluded that accommodation, even within claimant's restrictions, would be possible and that he did take

into account the required accommodations necessitated by the doctors' restrictions when contacting potential employers.

In workers' compensation litigation, it is claimant's burden to persuade the trier of fact by a preponderance of the credible evidence that the claimant's position is more probably true than not true on the basis of the whole record. See K.S.A. 44-501 (Furse 1993) and K.S.A. 1995 Supp. 44-508(g).

K.S.A. 44-510e (Furse 1993) states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Based upon the record, the Board finds claimant is entitled to a permanent partial general disability based upon a functional impairment before leaving respondent's employment and a work disability under K.S.A. 44-510e (Furse 1993) after leaving respondent's employment. On November 10, 1995, claimant underwent surgery on her knee and was paid temporary total disability compensation from August 8, 1995, through the end of December 1995. Claimant then returned to work for respondent through September 25, 1996. Claimant then terminated her employment with respondent and, on November 5, 1996, underwent an MRI, followed, on November 15, 1996, by the first of the two back surgeries. Pursuant to the parties' stipulations, claimant was temporarily disabled from November 17, 1996, through January 30, 1998, a period of 62.86 weeks. During this time, claimant underwent separate surgeries, the first on November 15, 1996, with a second surgery on January 2, 1997.

Immediately upon being released by Dr. Drisko, the treating physician, claimant started working with Russell Stover at a comparable wage. She continued in that employment for nine months until her termination of employment on or about September 30, 1998. This termination of employment was necessitated by claimant's inability to perform the newly assigned job within her restrictions. Claimant continued

looking for a job after leaving Russell Stover until sometime in July 1999, at which time she simply quit looking for employment.

The Board finds for the periods following her knee and back surgeries, claimant is entitled to temporary total disability compensation totaling 20.86 weeks (between August 1995 and December 1995) and 62.86 weeks (as stipulated by the parties), for a total of 83.72 weeks temporary total disability compensation. During the time claimant returned to work with respondent and was earning a wage comparable to his pre-injury wage, claimant is limited to her functional impairment.

K.S.A. 44-510e (Furse 1993) defines functional impairment as:

... the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein.

The Administrative Law Judge made no findings regarding claimant's functional impairment. However, under these circumstances, the Board is compelled to determine claimant's functional impairment. Dr. Murati opined claimant had a 23 percent impairment to the body as a whole, with Dr. Mills opining claimant had an 11 percent impairment to the body as a whole. The Board finds no justification for placing greater weight on the opinion of either doctor and, in considering both Dr. Murati and Dr. Mills, finds claimant has suffered a 17 percent impairment to the body as a whole on a functional basis for the injuries suffered to her knee and back.<sup>2</sup>

The only doctor to express an opinion regarding claimant's loss of task performing abilities under K.S.A. 44-510e (Furse 1993) was Dr. Murati, who opined claimant lost 80 percent of her task performing abilities. The Board, therefore, finds claimant has suffered a loss of task performing abilities of 80 percent.

With regard to claimant's loss of wage earning, the Board finds during the periods when claimant was working for respondent and for Russell Stover at comparable wages, claimant is limited to her functional impairment. During the times when claimant was on temporary total disability compensation, she would not be entitled to additional work disability payments. However, after claimant was forced to leave Russell Stover, claimant

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<sup>2</sup> It is noted that both Dr. Murati and Dr. Mills utilized the AMA Guides, Fourth Edition, while the version of K.S.A. 44-510c in effect on the August 8, 1995 date of accident requires the use of the Third Edition, Revised, of the AMA Guides. Neither party objected to the medical opinions of Drs. Murati and Mills. The Board, therefore, considers both opinions as though stipulated to by the parties.

would be entitled to a work disability under K.S.A. 44-510e (Furse 1993). As claimant was earning no income during that time, claimant's wage loss would be 100 percent.

With regard to the wage loss percentage, however, the Board must take into consideration the policies set forth by the Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals held that if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability.

The Board finds claimant did put forth a good faith effort through the end of July 1999. Claimant attempted to locate a job and talked to employers while seeking appropriate employment. The Board finds claimant entitled to a loss of wages of 100 percent during that period of time. Pursuant to claimant's testimony, however, by the end of July 1999, claimant ceased looking for employment. As of that date, the Board finds claimant in violation of the good faith policies set forth in Copeland, and the Board is obligated as the trier of fact to impute a wage based upon the evidence in the record.

The only opinion regarding claimant's ability to earn wages is that of Mr. Hardin, who opined that claimant had the ability to earn \$206 per week which is the federal minimum wage and based upon a 40-hour week. \$206 when compared to claimant's stipulated average weekly wage of \$229.37 equates to 90 percent of claimant's average weekly wage from the date of accident. As provided by statute, so long as an employee is engaging in any work for wages equal to 90 percent or more of the average weekly wage that the employee was earning at the time of the injury, that employee is limited to her functional impairment. The Board finds, in imputing Mr. Hardin's wage of \$206, that claimant had the ability to earn 90 percent of her average weekly wage as of the end of July 1999 and is, thereafter, limited to her functional impairment of 17 percent effective August 1, 1999.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the July 24, 2001, Award of Administrative Law Judge Jon L. Frobish should be, and is hereby, modified, and an award is granted in favor of the claimant, Sandra Knoblich, and against the respondent, Nu Wa Industries, Inc., a self-insured, for an injury occurring on August 8, 1995.

For the period August 8, 1995, through December 31, 1995, claimant is entitled to 20.86 weeks temporary total disability compensation at the rate of \$152.92 per week totaling \$3,189.91.

For the period January 1, 1996, through September 25, 1996, while working for respondent, claimant is entitled to her functional impairment of 17 percent which computes to 38.43 weeks permanent partial disability compensation at the rate of \$152.92 per week totaling \$5,876.72.

As of September 26, 1996, claimant is entitled to a work disability based upon her 80 percent task loss and her 100 percent wage loss through November 16, 1996, a period of 7.43 weeks which, at \$152.92 per week, equals \$1,136.20.

Beginning November 17, 1996, claimant is entitled to temporary total disability compensation for 62.86 weeks at the rate of \$152.92 totaling \$9,612.55.

Effective January 31, 1998, when claimant returned to work at a comparable wage, claimant is entitled to the remainder of her 17 percent functional impairment which computes to 13.01 weeks at \$152.92 per week totaling \$1,989.49. Beginning October 1, 1998, when claimant lost her job with Russell Stover, and continuing through July 31, 1999, claimant is entitled to 43.43 weeks permanent partial disability compensation for a 90 percent permanent partial general body disability totaling \$6,641.32.

As of August 1, 1999, claimant is once again entitled to her 17 percent functional impairment. As claimant's functional impairment has been fully paid as of this date, payments to claimant would cease. Claimant is, therefore, entitled to a total award of \$28,446.19.

As of the date of this award, the entire amount as above calculated is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

Claimant is further entitled to unauthorized medical payments up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it does not contravene the provisions of the appropriate version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are assessed against the respondent to be paid as follows:

Karen Starkey, CSR  
Transcript of Regular Hearing

Unknown

Martin D. Delmont, CSR Deposition of Jerry Dean Hardin	\$186.00
Barber & Associates Deposition of Pedro A. Murati, M.D.	\$186.40
Patricia K. Smith, CSR Deposition of Sandra Knoblich	Unknown
Ireland Court Reporting Deposition of Dan R. Zumwalt	\$219.88
Deposition of Philip R. Mills, M.D.	\$491.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant  
John I. O'Connor, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director